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FIA LAW & COMPLIANCE DIVISION

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February 7, 2000

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Ms. Jean A. Webb
Secretary of the Commission
Commodity Futures Trading Commission
1155 21st Street, NW
Washington, D.C. 20581

Re: Exemption From Registration as a Commodity Trading Advisor

Dear Ms. Webb:

The Law & Compliant Division of the Futures Industry Association ("FIA") is pleased to submit the following comments on the proposed amendment to Commodity Futures Trading Commission ("Commission") rule 4.14, that would exempt from registration commodity trading advisors ("CTAs") who provide advice to clients by means of media such as newsletters, internet web sites and non-customized computer software. 64 Fed. Reg. 68304 (December 7, 1999). FIA, a not-for-profit corporation, is a principal spokesman for the futures industry. Its members include approximately sixty of the largest futures commission merchants in the United States. Among its associate members are representatives from virtually all other segments of the futures industry, both national and international. Reflecting the scope and diversity of its membership, FIA estimates that its members effect more than eighty percent of all customer transactions executed on United States contract markets.

The Commission proposes to adopt new subsection (a)(9) to rule 4.14 exempting from registration those CTAs who do not (i) direct client commodity interest accounts, (ii) provide commodity interest advice tailored to particular clients or (iii) provide such advice through interactive communications with individual clients. The new rule is intended to minimize the impact of the Commission's rules on freedom of speech and to eliminate any question of whether registration of the CTAs described in the new rule would violate constitutional limits on restraint of speech under the First Amendment. The FIA supports both goals of the proposal.

The FIA, however, has some specific comments based on our understanding of *Lowe v. SEC*, 472 U.S. 181 (1985). In that case, the Supreme Court distinguished between impersonal client communications in the form of newsletters containing information and opinions with respect to securities, on the one hand, and individualized, investment-related interactions, on the other. The former category of communications were found to come within an exclusion from registration as an investment adviser. The Supreme Court implies that a registration requirement with respect to this category of communications would violate the First Amendment.

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Based on the distinction made in *Lowe*, we suggest that the new rule be clarified to focus more emphatically on the nature of the advice rather than the medium employed for the communication. The exemption should be available for advice which is non-personalized, regardless of how the advice is received by the client. For example, impersonal advice may be provided on a website that is interactive in nature, requiring a client to select among inquiry paths or categories of information. A client might be asked to specify which of several categories of information he wishes to receive, e.g., financial products, agricultural products or metals. The client would then view standard, non-personalized information on whichever products were selected. The spirit of *Lowe* directs that an advisor should be able to render this type of advice without registration.

The exemption as written, however, might be unavailable to a CTA providing the type of advice in the above example. The CTA may be unable to meet the requirements of 4.14(a)(9)(ii) because the advice has, in a way, been tailored to the circumstances of the particular client. A client not requiring information on financial products or agricultural products or metals will not receive it. In addition, the CTA may be unable to meet the requirements of 4.14(a)(9)(iii) because an interactive communication has occurred.

Some of the examples provided by the Commission similarly impose inappropriate restrictions on an unregistered CTA's ability to communicate with its clients. By way of illustration, the Commission would prohibit a CTA from responding to telephone queries from clients about the CTA's recommendations, even if the CTA has no knowledge of the client's particular circumstances and the advice is not in any way customized for the client (*see* Example D). In like fashion, the Commission would require a CTA to register if he or she presents information at a seminar or through other "face-to-face" communications with clients even if the advice is precisely the same as that which would be available through purchase of the CTA's computerized trading system or facsimile hotline service (*see* Example E).

Thus, FIA believes that the Commission's approach focuses too narrowly and mechanically on the *method* — rather than the *content* — of communications between an advisor and its clients. *Lowe*, and the recent decisions of the courts that have struck down the registration requirements of Section 4m of the Commodity Exchange Act in contexts such as this, make clear that the First Amendment shields from government supervision and licensing requirements advice that is not personalized to a customer's particular circumstances. The mere fact that the protected speech in question (the CTA's recommendation) is delivered personally, rather than through a newsletter, fax machine or similar medium, does not change the analysis. A CTA who does nothing more than deliver impersonal advice should not — indeed, can not — be required to register with the government before he or she can communicate with clients.

Therefore, we recommend that the rule be amended as noted below, or, in the alternative, that 4.14(a)(9)(iii) be deleted and that examples be added to the release adopting the rule that clarify that tailoring such as described in our first example above does not fall within the prohibitions in 4.14(a)(9)(ii). In recommending this change, the FIA notes that the anti-fraud provisions of the Commodity Exchange Act continue to apply to unregistered CTAs, meaning that any website or

e-mail or other interactive communication by a CTA that acts as a fraud on clients is subject to action by the Commission whether or not the CTA is registered with the Commission[1].

The proposed rule could be amended by addition of the following proviso:

> Provided, however, that nothing in this subsection (9) may be construed to prohibit the use of electronic or other interactive exchanges between clients and advisors that do not include individualized investment advice.

The FIA appreciates this opportunity to submit these comments on proposed rule 4.14(a)(9). If you have any questions regarding this letter, please contact Barbara Wierzynski, FIA's General Counsel, or me at 202-466-5460.

Very truly yours,

Ronald H. Filler
President

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1 The FIA also questions whether the Commission's requirement that CTAs exempt under new rule 4.14(a)(9) remain subject to the disclosure requirement of rule 4.41 would withstand scrutiny under the First Amendment.